Paul J. Dayton
Brian S. Epley
SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088
206-682-3333
Attorneys for Plaintiffs the Confederated Tribes of the Colville Reservation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

JOSEPH A. PAKOOTAS, an individual and enrolled member of the Confederated Tribes of the Colville Reservation; and DONALD L. MICHEL, an individual and enrolled member of the Confederated Tribes of the Colville Reservation, and the CONFEDERATED TRIBES OF THE COLVILLE RESERVATION ,

Plaintiff,

and

STATE OF WASHINGTON ,

Plaintiff-Intervenor,

v.

TECK COMINCO METALS LTD., a Canadian corporation ,

Defendant.

NO. 2:04-cv-00256-LRS

PLAINTIFF THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE NEW EVIDENCE AND LEGAL THEORIES

I. INTRODUCTION

Teck Metals, Ltd, (Teck) objects to supplemental testimony from Patti Bailey and three attached exhibits describing evolution of the Teck's administrative settlement with the Environmental Protection Agency (EPA) in which it under took investigation and cleanup under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). It also states a broader objection to alleged new theories. Teck's motion has no force. The Agreement on Consent that is the focus of Ms. Bailey's testimony was not signed until August, 2015 and was not provided to the Tribes until late November and could not have been included in prior filings with the Court.[1] As for the legal theories reflected in recent submittals, the Tribes' claims in this case have been the same from the beginning. If the form of argument has varied to conform to this Court's ruling that is the natural course of litigation.

From the beginning of Phase II of this case, the Confederated Tribes of the Colville Reservation (the Tribes) has sought recovery of its costs of investigation, evaluation and proof of Teck's liability as a covered party under CERCLA. The Tribes complaint sought recovery of these "response" costs, Second Amended Complaint, paragraphs 4.14-4.15 and 7.2, and its proposed Pretrial Order specified

---

[1] Teck complains about a supplemental filing on December 1. That was an erroneous filing and the Tribes will withdraw it. The relevant and operative supplemental testimony from Patti Bailey was filed November 25, 2015.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

them as "response" costs. ECF 2309, p. 9 ¶ 10. Beginning at paragraph 10 of the Pretrial Order, the Tribes listed $9,108,616.91[2] in past response costs comprised of (1) Employee Labor and Travel, (2) Testifying Experts, (3) Consulting expert and investigation services, (4) other non-testifying experts/consultants, (5) vendors, (6) Attorneys Fees, and (9) Miscellaneous costs. It then listed the forms of investigation and evaluation of site conditions in paragraph 12, it broke them in two categories: (1) Collection of Cores and Porewater at UCR Site and Data Analysis ($589,907.77) and (2) Total Cost for Investigation, Evaluation and Assessment of Source of Hazardous Substances at UCR Site ($4,483635.90); and provided the basis for the calculations. These costs were first disclosed in Rule 26(a)(1) disclosures in 2013 and, with minor variation in calculations and deductions to eliminate grant funding, they have remained the same ever since. Since the outset of the case, the Tribes has requested award of these costs as response costs as defined in CERCLA. Teck is quite well positioned to understand and evaluate these costs as Teck tested, challenged and ultimately accepted the results of this work in Phase I of this case.

Teck has never contested the amount the Tribes spent, nor has it denied that these costs were all incurred in proving that Teck is a covered party under CERCLA. Instead, it has challenged the accuracy of the Tribes' efforts to remove grant funded payments from its claim, claiming non-compliance with the National

---

[2] Based on this Court's ruling denying recovery for UAO enforcement costs, this total will be reduced to approximately $7.8 million.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

Contingency Plan, and it has argued that the Tribes' claimed costs are not within the scope of response costs recoverable under section 107(a)(4)(A). As it has argued in its motion for summary judgment, it claims that the Tribes may not recover the costs of proving Teck's liability because it lacks enforcement authority under CERCLA. The Court has issued its ruling and trial of this case will determine whether the Tribes' costs are recoverable response costs.

The relevant definition of response costs, 42 U.S.C. 101(25), defines such costs to include "removal" and "remedial" costs and each term "include[s] enforcement costs related thereto." Thus, all of the Tribes costs must be "removal" or "remedial." Within each category, costs may be removal, for example, and related enforcement costs. "Enforcement costs" are not independently defined as a separately recoverable cost under CERCLA. So, "enforcement costs" must be a form of remedial or removal action.

From the outset of this case, the Tribes has regarded and described its actions and costs as incurred in proving Teck's liability—enforcing Teck's responsibility to cleanup the site. That has never changed and it is the Tribes' position at trial. As CERCLA's definition of "removal" in section 101(23) specifies action necessary to "prevent, mitigate or minimize damage…to the environment" and a section 104(b) action is a statutorily defined example of such action, the Tribes has a well anchored ground to recover its costs incurred in proving (or enforcing) Teck's obligation to clean up the UCR Site under CERCLA.

Teck now loudly complains that the Tribes is changing position by arguing that its costs meet the statutory definition of "removal" action when it has

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

described its costs as "enforcement." Teck created a false distinction for itself by crafting discovery requests that did not track the CERCLA definition of response costs. It asked about "enforcement costs" as if they are distinct from "removal" and "remedial" costs. As explained above, "enforcement costs" are a species of "removal" or "remedial" costs and are not independently defined. The Tribes readily agreed and still maintains that many of its costs were incurred enforcing Teck's liability. Although most of its costs were incurred proving Teck's liability and sound in "enforcement" necessary to prevent or mitigate injury to the environment, in the interest of avoiding confusion created by Teck's attempt to create a separate category of "enforcement" costs, the Tribes has explained that certain of its investigation and evaluation costs would be within the definition of "removal" costs even if no enforcement was attempted. The characterization of these costs is no surprise to Teck as it was disclosed in the Tribes expert witness reports in Phase I and Teck's Phase I experts scrutinized that work and attempted—unsuccessfully—to refute it. As Teck has had all of the Tribes' costs records since the beginning of Phase II, Teck's lawyers, who are experienced in environmental law, are able to determine for themselves how CERCLA's definitions apply to these facts.

It appears that Teck hoped to restructure the CERCLA definition of response costs in its framing of discovery requests and treat "enforcement" as solely a "prevailing party" fee shifting clause and not an aspect of removal. Whatever the fate of that strategy, the Tribes accounting of and description of its costs has been consistent and is no basis for in limine relief now.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

Teck now complains that the Tribes has recently offered a group of three new exhibits relating to an administrative settlement Teck entered into with EPA under CERCLA in August, 2015 and argues that it should have been provided sooner. To state the obvious, the document was not signed until less than four months ago. Teck never provided it to the Tribes and the Tribes did not obtain it until late November, after this Court issued its summary judgment ruling. Dayton Decl., ¶ 2. Teck evidently would have preferred to keep this document confidential until after trial as it is powerful evidence that the Tribes' success in proving Teck's liability under CERCLA has done just what EPA anticipated in its letter to Teck in 2008. *See* ECF 2288, pp.18-19 (Summary Judgment Order). Instead of settling for a non-CERCLA RI/FS Agreement, EPA was now able to negotiate an agreement enforceable under CERCLA that will lead to cleanup of Site conditions. Indeed, today's correspondence from EPA to the Tribes and Teck confirms this. *See* Dayton Decl., Exh. A. (Albright letter dated December 3, 2015). Teck has no basis to exclude its CERCLA agreement from evidence.

Teck also complains that after this Court's summary judgment ruling the Tribes is arguing that the Supreme Court's *Key Tronic* decision supports its recovery of response costs, when previously it argued that the Ninth Circuit's decisions in *United States v. Chapman*, *DOT* and other Ninth circuit authority governed. The Tribes is bound to accept this Court's rulings and apply applicable authority as this Court indicates. While the Tribes does not agree with all aspects of the Court's ruling, nothing in the Court Rules or case law bars the Tribes from making the best of the Court's decision.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

II. ARGUMENT

A. Teck's objections are inapplicable as the Tribes has not changed its legal contentions.

The Tribes' claims and facts supporting those claims have been consistent from the Second Amended Complaint to the Joint Pretrial Order. Notably, Teck does not quote from either operative document. It is not until page three of Teck's motion that it begins to describe its allegations of change of position. Instead of focusing on the Tribes claims as stated in the operative documents, it quotes selectively from discovery responses. Teck's brief runs ten pages, but its point can be summarized in a sentence: The Tribes answered a Teck discovery requests asking for identification of "enforcement costs" and other inquiries by stating that many of its costs were incurred in "enforcement" of Teck's liability. The Tribes' Second Amended Complaint and portions of the Joint Pretrial Order accurately describe the Tribes claim to recover response costs as defined by CERCLA. ECF 148, ¶ 7.2. & ECF 2309, p. 9 ¶ 10. It will be for the Court to determine whether investigative, evaluative and enforcement costs described herein meet that response costs definition.

Presumably, Teck issued its requests intending to make its argument that enforcement costs are not recoverable without section 104 authority and it has done so. The Tribes' response to Teck's attempted artificial distinction between "enforcement" and "removal" may aid Teck in making, but it does not prevent the Tribes from arguing that under CERCLA enforcement is a form of removal and its actions in enforcing Teck's liability as a covered party aids cleanup at the Site and are recoverable.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

B. Teck's Authority Is Off Point.

Judicial estoppel has no application here. It applies in the rare case of intentional self-contradiction used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice. *Arizona v. Shamrock Foods, Co.*, 729 F. 2d 1208, 1215 (9th Cir. 1984). The Tribes' good faith responses to Teck's discovery requests and its fair and frank statements that it seeks its costs of enforcing Teck's liability as response costs in this case do not meet this test.

Teck claims that had the Tribes answered differently, it would have pursued the matter in discovery, but never explains what it would pursue. It knows what work was done. And the Tribes has provided very clear summaries showing exactly what it claims and what it did. All that is left is for the Court to decide whether such work meets the CERCLA definition.

Teck seems to argue that the Tribes submission of Teck's Agreement on Consent under CERCLA somehow represents a change of position. Without citing the Tribes Second Amended Complaint or the Joint Pretrial Order, it reasons that the Tribes had never argued that its costs of enforcement incurred in litigation advanced the cleanup of the UCR Site. Teck's Motion at p.6. To the contrary, the Pretrial Order is stuffed with allegations that Teck has litigated for more than a decade to avoid cleaning up its wastes and only through litigation will Teck ever accept that responsibility. And that is the case. Teck, for its part strenuously insists that the Tribes litigation was unnecessary because it would have volunteered to cleanup the Site after the end of the RI/FS, while it spent millions and explored every alternative to avoid that outcome.

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com

In the Joint Pretrial Order, the Tribes described its issues of law and stated "Are the Tribes' costs incurred responding to releases or threatened releases of hazardous substances disposed at the UCR Site by Teck recoverable costs of "removal" or "remedial" action including "response" costs." ECF 2309. That is the question that must be decided and the Tribes has never varied from it. That Teck finally agreed to CERCLA action in August, 2015 only after the Tribes proved its liability under CERCLA helps prove this point. Nothing in Teck's brief explains why it such evidence should be excluded.

III. CONCLUSION

The Pretrial Order governs trial of this case. The Court should address objections to evidence on the merits of the individual exhibit. If the Tribes offers any evidence inconsistent with prior judicial admissions or sworn discovery responses, Teck is certainly free to attempt impeachment and the Court can decide the persuasiveness of such efforts.

DATED this 3rd day of December, 2015.

SHORT CRESSMAN & BURGESS PLLC

By: /s/ Paul J. Dayton
Paul J. Dayton, WSBA No. 12619
Brian S. Epley, WSBA No. 48412
999 Third Avenue, Suite 3000
Seattle, WA 98104-4088
Telephone: 206.682.3333
Fax: 206.340.8856
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2015, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties of record.

SHORT CRESSMAN & BURGESS PLLC

By */s/ Paul J. Dayton*
Paul J. Dayton, WSBA No. 12619

SHORT CRESSMAN & BURGESS PLLC
999 Third Avenue, Suite 3000, Seattle, WA 98104-4088
206.682.3333 phone | 206.340.8856 fax | www.scblaw.com